IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 24, 2007 Session

STATE OF TENNESSEE v. MARVIN WILKERSON

Direct Appeal from the Criminal Court for McMinn County
No. 04-235 Carroll L. Ross, Judge

No. E2006-01743-CCA-R3-CD - Filed October 9, 2007

The appellant, Marvin Wilkerson, was convicted by a jury in the McMinn County Criminal Court of possessing .5 grams or more of cocaine with the intent to sell or deliver. The trial court sentenced the appellant, as a career offender, to sixty years in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence supporting his conviction and the sentence imposed by the trial court. Upon our review of the record and the parties' briefs, we affirm the appellant's conviction for possession of .5 grams or more of cocaine with intent to sell or deliver. However, because the appellant was improperly sentenced as a habitual drug offender, we reverse the judgment of the lower court as to the sentence and fine imposed. Accordingly, we remand for an entry of a judgment reflecting that the appellant was convicted of a Class B felony with an accompanying sentence of thirty years to be served at sixty percent and a fine of $10,000.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed in Part, Reversed in Part; Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Ashley L. Ownby, Cleveland, Tennessee, for the appellant, Marvin Wilkerson.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Steve Bebb, District Attorney General; and Wylie Richardson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At trial, Detective Bill Matthews, an Athens Police Department (APD) detective, testified that on February 27, 2004, he and other members of the APD executed a search warrant on a residence and tool shed located at 610 East Harper Johnson Drive. The residence was located on a

dead end road beside railroad tracks. Police approached the residence from the railroad tracks through an opening in the woods. They knocked on the door and identified themselves as law enforcement present to execute a search warrant; however, no one answered the door. Officer Tracey Brown used a "ram" to open the door.[1] Detective Matthews followed Officer Brown inside the house.

Upon entering the residence, Detective Matthews saw the appellant and two women sitting on a couch in the living room. Detective Matthews saw that the appellant "had bent over and was pushing a tray underneath the couch." Detective Matthews retrieved the tray from underneath the couch below the appellant's legs and saw thereon a large rock of crack cocaine, several smaller rocks of crack cocaine, and a razor. Detective Matthews surmised that the razor on the tray was being used "to cut the smaller rock off of the larger rock to sell." Detective Matthews explained:

> Rocks, rocks are sold 20 dollar rocks, is usually what [crack cocaine] is sold, 10, 20 dollar rocks, 40 dollar rocks on the street. And on this particular case with the tray, the bigger rock was not a 20 dollar rock. It was a large rock that they were, looked like cutting 20 dollar rocks off of.

Additionally, when Detective Matthews saw the appellant push the tray underneath the couch, he also saw the appellant make "a hand movement." Detective Matthews said that the movement was "a flip type motion," and after the appellant made the motion, the only item found on the floor nearby was a blue cosmetics case. Detective Matthews acknowledged that he did not see the blue cosmetics case come out of the appellant's hand. However, the detective believed the item originated from the appellant because of the arm "motion and then the [blue cosmetics case], laying on the floor beside him, by the couch." In the small blue cosmetics case, Detective Matthews found two plastic bags containing crack cocaine. The detective opined that the crack cocaine was "bagged for resale. The different bags, the scenario of where they were at, what was happening with them, with the tray, the razor, the smaller ones cut off the bigger one, the, the amounts of smaller rocks that's in the bags, it was bagged for resale."

During the search, police found James McDermott in a bedroom of the residence. Crack cocaine and marijuana were found on McDermott's person and on a nightstand in the room. Detective Matthews said that police did not find any pipes for smoking crack cocaine at the residence.

Sharon Silvers, a forensic drug analyst with the Tennessee Bureau of Investigation (TBI), testified that she tested the substance found in the blue cosmetics bag and determined that it was 2.2 grams of cocaine base. She tested the substances found in the bedroom and on the tray and

[1] Detective Matthews described a "ram" as a "a pipe, a long pipe with handles" and as a "metal contraption that helps you get in."

determined that they were 7.8 grams of cocaine base.[2]

James McDermott testified that he pled guilty to possession of the crack cocaine that was found in the bedroom. McDermott admitted ownership of the crack cocaine in the bedroom; however, he said that the crack cocaine found in the living room did not belong to him. McDermott testified that at the time of the execution of the search warrant, he and the appellant were staying at the residence.

Based upon the foregoing, the jury found the appellant guilty of possession of .5 grams or more of cocaine with the intent to sell or deliver, a Class B felony, and imposed a $10,000 fine. After trial, the trial court held a hearing during which the State submitted to the jury certified copies of the appellant's prior felony drug convictions. The jury was advised that if it found that the appellant had prior felony drug convictions it could increase the appellant's fine. Thereafter, the jury returned an increased fine of $200,000. At sentencing, the trial court stated that the jury had found the appellant to be an habitual drug offender, thereby rendering his conviction a Class A felony. The trial court also stated that the jury had determined that the appellant was a career offender, and the court agreed with that determination. Therefore, the trial court sentenced the appellant to sixty years incarceration in the Tennessee Department of Correction, with sixty percent of the sentence to be served in confinement before eligibility for release. On appeal, the appellant challenges the sufficiency of the evidence supporting his conviction and the sentence imposed by the trial court.

II. Analysis

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

In order to sustain the appellant's conviction, the State was required to prove that the appellant knowingly possessed a controlled substance, i.e. cocaine, with the intent to sell or deliver.

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[2] Silvers did not testify as to the individual weights of the substances found in the bedroom or the substances found on the tray in the living room.

See Tenn. Code Ann. § 39-17-417(a)(4) (2006). Possession of contraband, such as drugs, can be either actual or constructive. See State v. Transou, 928 S.W.2d 949, 955 (Tenn. Crim. App. 1996). As this court explained in State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987) (citations omitted):

> Before a person can be found to constructively possess a drug, it must appear that the person has "the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or through others." In other words, "constructive possession is the ability to reduce an object to actual possession." The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. Likewise, mere association with a person who does in fact control the drugs or property where the drugs are discovered is insufficient to support a finding that the person possessed the drugs.

Furthermore, "if the amount involved is point five (.5) grams or more of any substance containing cocaine," the offense is a Class B felony. Tenn. Code Ann. § 39-17-417(c)(1).

The proof adduced at trial reveals that Detective Matthews saw the appellant push under the couch a tray bearing a large rock of crack cocaine, smaller rocks of crack cocaine ostensibly cut from the larger rock, and a razor for cutting the crack cocaine. Therefore, the proof indicates that the appellant had at least constructive possession of the crack cocaine on the tray. Further, Detective Matthews saw the appellant perform a "flip" motion with his hand, and the blue cosmetics case was the only object on the floor in the area toward which the appellant made the "flip" motion. We conclude that the proof indicates that the appellant had at least constructive possession of the crack cocaine in the cosmetics case. See Armstrong v. State, 548 S.W.2d 334, 337 (Tenn. Crim. App. 1977). Additionally, Detective Matthews noted that the large rock of crack cocaine on the tray was not in conformance with how crack cocaine is typically sold; however, the smaller rocks on the tray were "20 dollar rocks" of the type that are sold on the street. Also, the crack cocaine in the cosmetics case was packaged individually in plastic bags. Agent Silvers testified that the amount of cocaine found on the tray and in the cosmetics case was well over .5 grams. Moreover, there was no evidence at trial that the appellant possessed any drug paraphernalia for his personal use of the crack cocaine. See State v. Brown, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995). Tennessee Code Annotated section 39-17-419 (2006) provides that "[i]t may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." We conclude that the foregoing proof was sufficient to sustain the appellant's conviction for possessing .5 grams or more of cocaine with the intent to sell or deliver. See State v. Michael Rogers, No. W2003-02175-CCA-R3-CD, 2004 WL 1575055, at *2 (Tenn. Crim. App. at Jackson, July 14, 2004); State v. Thomas Lawrence, No. M2000-00493-CCA-R3-CD, 2000 WL 1880614, at *6 (Tenn. Crim. App. at Nashville, Dec. 29, 2000).

As his next issue on appeal, the appellant challenges his classification as a career offender, arguing that such a determination violates Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005). Specifically, the appellant claims that the Booker court "invalidated the mandatory nature of federal sentencing guidelines," and that the trial court in the instant case impermissibly "mechanically applied the enhanced penalty sought by the state."

Both Booker and Blakely concern the authority of a trial court to enhance a sentence based upon facts not necessarily found by a jury or admitted by the defendant. However, Blakely authorizes the use of previous criminal convictions to enhance a sentence without a factual determination by a jury.

In Tennessee, a career offender is one who has "[a]ny combination of six (6) or more Class A, B or C prior felony convictions, and [whose] conviction offense is a Class A, B or C felony." Tenn. Code Ann. § 40-35-108(a)(1) (2006). A trial court determines whether an offender should be classified as a career offender by looking solely at prior convictions. If the trial court finds that an offender is a career offender, the trial court has no discretion regarding the sentence to be imposed. The trial court is required to impose "the maximum sentence within the applicable Range III." Tenn. Code Ann. § 40-35-108(c). As such, imposing the sentence mandated by law after finding one to be a career offender is not violative of Blakely. State v. Daniel W. Livingston, No. M2004-00086-CCA-R3-CD, 2005 WL 639125, at *16 (Tenn. Crim. App. at Nashville, Mar. 15, 2005), overruled on other grounds by State v. Livingston, 197 S.W.3d 710 (Tenn. 2006). Thus, the trial court did not err in finding the appellant to be a career offender.

Although not raised by the appellant, during our review of the record we discerned unfortunate errors that occurred in the lower court which were not raised on appeal, namely the amount of the fine imposed, the appellant's designation as an habitual drug offender, and the increase in the classification of the offense to a Class A felony. Typically, the failure to include an issue in a motion for new trial waives the issue on appeal. Tenn. R. App. P. 3(e) (stating "no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived"). However, this court may analyze any error under the plain error doctrine.

Tennessee Rule of Criminal Procedure 52(b) provides that this court may address "[a]n error which has affected the substantial rights of an accused . . . at any time, even though not raised in the motion for a new trial . . . where necessary to do substantial justice." See also Tenn. R. Evid. 103(d). We may only consider an issue as plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected;

> (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); see also State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the Adkisson test for determining plain error). Furthermore, the "'"plain error" must be of such a great magnitude that it probably changed the outcome of the trial.'" Adkisson, 899 S.W.2d at 642 (quoting United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988)).

Turning to the first instance of plain error, we note that the record reflects that before the jury retired to deliberate on the appellant's guilt of the charged offense, the trial court instructed the jury that upon finding the appellant guilty, it could fine the appellant in an amount between $2,000 and $100,000. The jury returned a verdict of guilt and imposed a fine of $10,000. After the appellant was convicted of the Class B felony offense of possessing .5 grams or more of cocaine with the intent to sell or deliver, the trial court held a hearing (hereinafter "fine hearing") in which the court instructed the jury that if it found that the appellant had previously been convicted of two or more felony drug offenses, the amount of the appellant's fine could be increased. The State submitted to the jury certified copies of the appellant's prior drug convictions, consisting of two Class E felony drug convictions, seven Class C felony drug convictions, and two Class B felony drug convictions. The court instructed the jury that if it found that the appellant had two prior felony drug convictions, the amount of the fine could be between $3,000 and $100,000. The court further instructed the jury that if it found that the appellant had three or more prior felony drug convictions, the amount of the fine could be between $5,000 and $200,000. The jury then found that the appellant had three or more prior felony drug convictions and imposed a $200,000 fine.

Our criminal code reflects that, generally, upon the first conviction for a felony drug offense involving a scheduled controlled substance, the minimum fine to be imposed is $2,000. Tenn. Code Ann. § 39-17-428(b)(9) (2006). However, after convictions of two or more felony drug offenses, the minimum amount of the fine to be imposed for a subsequent felony drug conviction is increased. For example, a second felony drug conviction carries a minimum fine of $3,000, Tenn. Code Ann. § 39-17-428(b)(10), while a third or subsequent felony drug conviction carries a minimum fine of $5,000. Tenn. Code Ann. § 39-17-428(b)(11). Further, the statute does not provide for an increase in the maximum fine. Tenn. Code Ann. § 39-17-417(c)(1) (stating that upon a conviction for a violation of Tenn. Code Ann. § 39-17-417(a) when the amount is .5 grams or more of cocaine, the fine may not exceed $100,000); but see Tenn. Code Ann. § 39-17-417(l)(3) (if an individual is found to be an habitual drug offender, the maximum fine is $200,000). As we have noted, during the guilt phase of the trial, the jury imposed a fine of $10,000. Therefore, because the jury did not have the authority during subsequent deliberation to impose a fine of $200,000, we conclude that it is appropriate to reinstate the jury's original fine of $10,000.

Thereafter, at the sentencing hearing, the trial court asked the parties to define the appellant's range classification. The State submitted that, based upon the judgments introduced at the fine hearing, the appellant was a career offender. The discussion continued as follows:

> [The State]: If you'll look at subsection (l) [of Tennessee Code Annotated section 39-17-417], Your Honor, and just to be candid with the Court, what the State filed, we actually checked on the notice of intent, career offender. Based upon that, we filed, in compliance with it, it says section 40-35-202, if that's followed, he is sentenced as a habitual drug offender, and he would qualify as that, that he would be sentenced for an A felony, if you'll look under subsection (3) in that particular portion of the statute.
>
> [The Court]: Okay. So you're saying that kicks him up to an A felony?
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> [The State]: Yes, Your Honor. . . . With the fines, we did that already.

Afterward, the trial court determined that the appellant was a career offender who had been convicted of a Class A felony. The trial court stated, "I don't have any leeway. I'm looking at 60 years mandatory, and I – there's no wiggle room for me." The court said:

> Let the record reflect that because of the proof, because of the jury verdict that increased him to the career offender, they've already fined him $200,000[.] . . . I sentence you to 60 years in the Tennessee Department of Correction[], and that will be served pursuant to the percentage [60%] there listed by law. Okay.
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> . . . .
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> [F]or the record, again, when they went back and recharged him on the bifurcated, the . . . the jury found those enhancements as a matter of fact.
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> . . . .
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> I accepted and approved that verdict, so for the purpose of the record, I find those enhancements as well, because they' re pretty well statutory as far as the prior convictions of this range, so – but I do want the record to reflect that I agree with the jury's verdict on the enhancement. I accept it and approve it, and I personally find that those factors exist as well that increase him to that, that Class A felony range.

We note that Tennessee Code Annotated section 39-17-417(l) provides:

> (1) If the district attorney general believes that a defendant should be sentenced as a habitual drug offender, the district attorney general shall file notice of the defendant's record of prior convictions for violations specified in this subsection (l) in conformity with the provisions of § 40-35-202.
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> . . . .
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> (3) Any person found guilty of a violation of this section that constitutes a Class A or Class B felony or attempts to commit a Class A or Class B violation of this section or conspiracy to commit a Class A or Class B violation of this section and who has at least three (3) prior Class A or Class B felony convictions or any combination thereof under the provisions of this section or § 39-6-417 (repealed) or under the laws of any other state or jurisdiction, which if committed in this state would have constituted a Class A or Class B felony violation under this section or § 39-6-417 (repealed); provided, that the prior convictions were for violations committed at different times and on separate occasions at least twenty-four (24) hours apart, shall be found to be an habitual drug offender and shall be sentenced to one range of punishment higher than the range of punishment otherwise provided for in § 40-35-105, and, in addition, shall be fined not more than two hundred thousand dollars ($200,000).

Clearly, during the fine hearing, the jury determined only that the appellant had a requisite number of previous felony drug convictions to warrant an increased minimum fine. Tenn. Code Ann. § 39-17-428(b)(11). The jury did not determine that the appellant had the requisite number of prior Class A or Class B felony convictions to warrant his classification as an habitual drug offender. Tenn. Code Ann. § 39-17-417(l)(3).

After reviewing the appellant's previous criminal history, we note that the appellant has no prior Class A felony drug convictions and only two previous Class B felony drug convictions; therefore, the appellant does not qualify as an habitual drug offender. Tenn. Code Ann. § 39-17-417(l)(3). Thus, the appellant should have been sentenced for the Class B felony of which he was convicted by the jury.[3] As we noted earlier the trial court correctly found that the appellant had the requisite number of previous felony convictions to qualify as a career offender. Tenn. Code Ann. § 40-35-108(a)(1).

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[3] We note that the habitual drug offender statute mandates that an habitual drug offender should be sentenced one *range* higher, not one *class of felony* higher. State v. Brian Roberson, No. M2005-01771-CCA-R3-CD, 2007 WL 92354, at *9 (Tenn. Crim. App. at Nashville, Jan. 11, 2007), perm. to appeal denied, (Tenn. 2007). Therefore, even if the appellant had been properly found to be an habitual drug offender, the class of felony should not have been increased from a Class B to a Class A.

In sum, the appellant was a career offender who was found guilty of a Class B felony offense. Accordingly, the trial court was required to sentence the appellant to thirty years in the Tennessee Department of Correction, with service of sixty percent of his sentence before becoming eligible for release. Tenn. Code Ann. §§ 40-35-112(c)(2) (2006); 40-35-501(f) (2006).

III. Conclusion

We affirm the appellant's conviction for the Class B felony offense of possessing .5 grams or more of cocaine with the intent to sell or deliver. However, we reverse the enhancement of the conviction to a Class A felony, the $200,000 fine, and the sixty-year sentence. Upon remand, the trial court is instructed to enter a corrected judgment to reflect the appellant's conviction for a Class B felony, with a $10,000 fine, and a sentence of thirty years to be served at sixty percent.

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NORMA McGEE OGLE, JUDGE